No. 98-2861

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BIG D ENTERPRISES, INC.; and DR. EDWIN G. DOOLEY, d/b/a Oak Manor Apartments,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF ARKANSAS

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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SUMMARY OF CASE AND WAIVER OF ORAL ARGUMENT

Ms. Cynthia Parks (now Ms. Williams) filed a complaint with the United States Department of Housing and Urban Development (HUD) against Dr. Edwin G. Dooley and Oak Manor Apartments alleging discrimination on the basis of race in rental housing. Ms. Williams amended her complaint to include a charge against Ms. Carol Ragan. HUD made a determination of reasonable cause and Dr. Dooley formally elected to have the charge heard in federal court. See 42 U.S.C. 3610(g), 3612(a).

After conducting its own investigation, the United States filed a two-count complaint against Big D Enterprises, Inc. and Dr. Edwin G. Dooley, the president and sole shareholder of Big D, alleging that defendants intentionally discriminated against Ms. Cynthia Williams on the basis of race, and engaged in a pattern or practice of discrimination in denying rental apartments to blacks, in violation of the Fair Housing Act of 1968, as amended. See 42 U.S.C. 3604, 3612(o), 3614(a). After trial, the jury awarded each of two sets of victims $500 compensatory damages and $50,000 punitive damages. In awarding punitive damages, the jury concluded that Big D and Dr. Dooley "acted with malice or reckless indifference to the rights of African Americans not to be discriminated against on the basis of race."

The United States does not seek oral argument. If the court believes that oral argument would be helpful, the United States suggests that each side be granted 15 minutes.

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STATEMENT OF ISSUES

I. Whether there is sufficient evidence to support the jury's verdict of a pattern or practice of discrimination, and the discriminatory treatment of identified victims; Ms. Williams and her minor children, and Ms. Poole and Mr. Batts.

Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997)

United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974)

United States v. L & H Land Corp., 407 F. Supp. 576 (S.D. Fla. 1976)

Perry v. Kunz, 878 F.2d 1056 (8th Cir. 1989)

II. Whether the district court abused its discretion when it denied a mixed motive jury instruction.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

Bachman v. St. Monica's Congregation, 902 F.2d 1259 (7th Cir. 1990)

III. Whether the jury's punitive damages award of $50,000 against each defendant for each set of victims is consistent with due process.

A. Whether federal law or state law governs admissibility of defendant's financial worth and assessment of damages.

Smith v. Wade, 461 U.S. 30 (1983)

Asbury v. Brougham, 866 F.2d 1276 (10th Cir. 1989)

McFadden v. Sanchez, 710 F.2d 907 (2d Cir.), cert. denied, 464 U.S. 961 (1983)

Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184 (7th Cir. 1982)

B. Whether the punitive damages award comports with due process.

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993)

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)

Dean v. Olibas, 129 F.3d 1001 (8th Cir. 1997)

IV. Whether the district court abused its discretion in evidentiary rulings that barred admission of: 1) nonbinding administrative determinations on an unrelated matter; 2) a pamphlet distributed by the United States as part of its investigation; and 3) testimony of a previously unidentified witness.

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988)

Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304 (8th Cir.), cert. denied, 469 U.S. 1041 (1984)

Sterkel v. Fruehauf Corp., 975 F.2d 528 (8th Cir. 1992)

Fed. R. Evid. 403

V. Whether the claims are barred by the statute of limitations.

Myers v. John Deere Ltd., 683 F.2d 270 (8th Cir. 1982)

42 U.S.C. 3610(g)(2)(C), 3612(o), 3614(a), 3614(b)

VI. Whether the district court abused its discretion in assessing $1,899 in attorney's fees and costs against defendants as a sanction for failure to respond to discovery requests.

Mansker v. TMG Life Ins. Co., 54 F.3d 1322 (8th Cir. 1995)

Milton v. Des Moines, 47 F.3d 944 (8th Cir.), cert. denied, 516 U.S. 824 (1995)

Altschuler v. Samsonite Corp., 109 F.R.D. 353 (E.D.N.Y. 1986)

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No. 98-2861

UNITED STATES OF AMERICA,

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v.

BIG D ENTERPRISES, INC.; and DR. EDWIN G. DOOLEY, d/b/a Oak Manor Apartments,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

STATEMENT OF THE CASE

On March 14, 1997, the United States filed a complaint against Big D Enterprises, Inc. (Big D); Dr. Edwin G. Dooley, the president and sole shareholder of Big D; Oak Manor Apartments; and Ms. Carol Ragan, a former employee of Big D, alleging violations of the Fair Housing Act of 1968, as amended (FHA), 42 U.S.C. 3601 et seq. (R. 1/App. Apx. 14-21).[1] Specifically, the United States alleged that Big D, Dr. Dooley, Oak Manor, and Ms. Ragan engaged in a pattern or practice of discrimination in denying rental apartments to blacks, 42 U.S.C. 3614(a), and

[1] "R. __" refers to the docket entry on the district court's docket sheet. "Tr. _:__" refers to the trial transcript by volume:page number. Parallel cites are provided to appellant's appendix (App. Apx.), appellants' addendum (App. Add.), or the United States' appendix (U.S. Apx.), when applicable. Appellant's brief is referred to as "Br." "App. Exh. __" or "U.S. Exh. __" refers to exhibits introduced at trial by the appellants and United States, respectively.

discriminated specifically against Ms. Cynthia Williams on the basis of race, 42 U.S.C. 3604, 3612(o). The United States sought injunctive relief, and compensatory and punitive damages for Ms. Williams and other identified victims (R. 1 at 6-8/App. Apx. 19-21). Prior to trial, the United States and Ms. Ragan entered into a consent decree (R. 12/App. Apx. 28-32). Further, at the request of the United States, Oak Manor was removed from the caption of the case as a separate defendant (R. 91/U.S. Apx. 33, Tr. 1:53).

After a four-day trial, during which Dr. Dooley denied all of the allegations, the jury found that Big D and Dr. Dooley had committed the statutory violations and awarded $500 compensatory damages to each of two sets of victims: Ms. Williams and her minor children, and Mr. Richard Batts and Ms. Janet Poole. The jury also assessed each defendant, Big D and Dr. Dooley, punitive damages of $25,000 to each set of victims. The district court entered judgment based on the jury's verdict and ordered injunctive relief (R. 98/App. Apx. 38-46).

The defendants filed a motion for judgment notwithstanding the verdict, remittitur, or new trial asserting, for the first time, a statute of limitations defense, and a due process challenge to the punitive damages award. The district court denied the motion (R. 112-113/App. Apx. 49-70). See United States v. Oak Manor Apartments (hereinafter Big D), 11 F. Supp.2d 1047 (W.D. Ark. 1998). This appeal followed.

FACTS

Dr. Dooley owns Oak Manor and Park Terrace, two apartment complexes in Fort Smith, Arkansas (Tr. 3:876, 879). Dr. Dooley is the president, sole officer, and sole shareholder of Big D (Tr. 3:874). At all times relevant herein, Big D also owned Village South, a third apartment complex in Fort Smith (Tr. 3:877, 879). Big D manages all three complexes (Tr. 1:99, 2:323, 3:878).

B. Evidence Of A Pattern Or Practice

Several Big D apartment managers and office personnel testified that Dr. Dooley instructed them not to rent apartments to black prospective tenants, oftentimes referring to blacks as "niggers." Ms. Virginia Cox, the former central office manager for Big D's rental properties, testified that Dr. Dooley so instructed her on two occasions (Tr. 1:112-114, 159, 161). Ms. Cox and Ms. Sheila Sevenstar stated that, on one occasion in early 1993, Dr. Dooley angrily told Ms. Cox to tell all of the resident managers that he did not want them renting to blacks (Tr. 1:113, 161). Ms. Kathy Roberts, then manager at Park Terrace, testified that in approximately August 1993, Dr. Dooley became angry at her for renting an apartment to a black couple (Tr. 1:222, 226-227). Ms. Roberts testified that at that time and on many subsequent occasions, Dr. Dooley instructed her not to rent to "niggers" (Tr. 1:227-228). Ms. Ruth McKown, then manager at Oak Manor, testified that after she rented an apartment to a black person in approximately December 1993, Dr.

Dooley told her not to rent to any more blacks (Tr. 1:240, 246-247).

Resident managers testified that they changed their rental practices to begin excluding blacks in response to Dr. Dooley's orders (See e.g., Tr. 1:179-181, 215-216, 248-259). Mr. Raymond Birdwell and Ms. McKown were the managers of Oak Manor apartments from September 1991 to November 1993, and November 1993 to July 1994, respectively (Tr. 1:170, 172, 240-241, 265). Mr. Birdwell testified that he used to rent apartments to blacks (Tr. 1:181-183). Mr. Birdwell explained that after he learned of Dr. Dooley's policy, in approximately early 1993, he told black apartment seekers that there were no vacancies, even when this was a lie (Tr. 1:178-180, 215-216). As a result, many black prospective renters did not submit applications (Tr. 1:200, 216). Both Mr. Birdwell and Ms. McKown testified that even when they did get applications from blacks, they followed Dr. Dooley and Big D's policy of not considering them for vacancies (Tr. 1:179, 183, 215-216, 249). Both managers explained that they did not treat black apartment seekers differently to their face; their outward behavior was polite so black apartment seekers did not know that they were rejected because of their race (Tr. 1:180, 249-250).[2]

[2] Managers, including Mr. Birdwell, Ms. McKown and Ms. Moore were aware that Dr. Dooley's policy to bar blacks from renting apartments was illegal and wrong (See e.g., Tr. 2:346). They also stated that they felt they had no choice but to conform to Big D and Dr. Dooley's policies, in part, to retain their employment (Tr. 1:179-181, 248-249, 2:329).

In addition, Ms. Roberts stated that whenever Dr. Dooley, Mrs. Elizabeth Dooley (Dr. Dooley's former wife), or Ms. Tricia Turner (Dr. Dooley's former stepdaughter), were present, she (Ms. Roberts) misinformed black apartment seekers at Park Terrace about vacancies (Tr. 1:229-230; see 1:237-238).[3]

Several Big D employees testified that at several staff meetings, beginning in early 1993, Ms. Cox told resident managers about Dr. Dooley's instructions not to rent to blacks (Tr. 1:159). Ms. Sevenstar, an employee in Big D's main office, testified that she heard managers and others at weekly meetings discuss several times that apartment managers "should avoid renting to blacks" (Tr. 1:159). Mr. Birdwell recalled Ms. Cox said that Dr. Dooley told her that "we shouldn't be renting to blacks and others" because he wanted to "clean the place up and get a better class of people" (Tr. 1:177-178). Mr. Randy Farris, then Big D maintenance supervisor, recalled one specific meeting attended by Mr. Birdwell; Ms. Loretta Moore, a central office employee; and Ms. Shirley Horne, a former manager at Village South, when Ms. Cox stated that they should not rent to black applicants (Tr. 1:285-286). In addition, Ms. Moore stated that she instructed three then resident managers of this policy; Mr. Birdwell, Ms. Horne, and Ms. Roberts (Tr. 2:328-329).

After Ms. Cox and other staff left Big D in the fall of 1993, the policy of refusing to rent to blacks continued (Tr.

[3] Prior to her marriage, Ms. Turner was known as Ms. Smith, and witnesses referred to her as Ms. Smith.

1:111, 228, 246, 279, 2:580). Mrs. Dooley and Ms. Turner supervised the apartment managers and oversaw the managers' daily activities and rental operations (Tr. 1:226, 244, 279, 2:577). Three apartment managers, Ms. Roberts from Park Terrace, and Ms. McKown and Ms. Ragan from Oak Manor, testified that Mrs. Dooley instructed them that they were not to rent to blacks, or as she referred to them, "niggers" (See e.g., Tr. 1:228, 246, 2:579-580).[4] On one occasion, Ms. McKown observed Mrs. Dooley misinform a black rental applicant about vacancies (Tr. 1:252). Ms. Turner also specifically instructed Ms. Ragan not to rent to the two groups of identified victims, Ms. Williams and her minor children, and Mr. Batts and Ms. Poole (Tr. 2:582-584).

Dr. Dooley's policy of denying rentals to blacks was implemented, but it was not "perfect" in practice. A small number of blacks did rent apartments at the complexes. Managers would rent, on occasion, during this time period to blacks and biracial couples, either knowingly or unknowingly (Tr. 1:182-183, 229-230, 2:346).[5]

As a result of the discriminatory policy, only a few blacks

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[4] Ms. Roberts testified that Mrs. Dooley told her she wanted to rent only to elderly, white people (Tr. 1:228). Ms. McKown testified that Mrs. Dooley told her that she should not rent to blacks, anyone with a "raggedy car," or "Vietnamese that looked like they couldn't pay the rent" (Tr. 1:246).

[5] If Dr. Dooley or his wife were not present, Ms. Roberts stated, she would rent to black applicants (Tr. 1:229-230). Mr. Birdwell unknowingly rented to a biracial couple, and was immediately criticized by Ms. Cox for such action (Tr. 1:181-182). Ms. Moore testified that if managers had "no other choice," they would rent to blacks (Tr. 2:346).

rented at Big D's apartment complexes over time (Tr. 1:253-254, 2:346). According to Mr. Farris, who performed maintenance at each complex at least twice a week during his employment by Big D from 1989-1995, the number of black tenants at Park Terrace "decreased significantly" during his employment (Tr. 1:274, 276, 283-284). He recalled one black tenant near the end of his tenure at Oak Manor, and no black tenants at Village South (Tr. 1:284). Other managers also testified to the absence of black tenants at Big D apartments (Tr. 1:182-183, 253-254, 2:346).

B. Evidence Of Identified Victims

1. Mr. Richard Batts And Ms. Janet Poole

The United States identified two sets of victims of defendants' discriminatory practices, both of whom sought an apartment at Oak Manor in October 1994. Mr. Richard Batts and Ms. Janet Poole, who are black, sought a two-bedroom apartment at Oak Manor (Tr. 2:475-476). Ms. Poole, Mr. Batts, and Ms. Carol Ragan, the manager, testified that Mr. Batts and Ms. Poole went to the rental office and Ms. Poole completed an application (Tr. 2:478, 521, 554, 580, 617). Ms. Ragan showed them two two-bedroom apartments. The first apartment (No. 122) was "trashed" and in need of major cleaning (Tr. 2:475-477, 520-521, 552-553, 581). The second apartment was virtually ready for occupancy (Tr. 2:475-477, 553).[6] Mr. Batts said that if the second

[6] The slightly different recollections of the three witnesses regarding how many apartments they were shown by Ms. Ragan and the exact condition of each apartment is not significant. As discussed below, this court must assess whether there are

(continued...)

apartment was taken, he was interested in the first apartment (Tr. 2:477).

Ms. Ragan told Mr. Batts and Ms. Poole that she was pretty sure they would be able to rent the apartment but she still had to talk to the owner (Tr. 2:477-478, 521-522). At the time, Mr. Batts and Ms. Poole had a combined monthly income of approximately $1,400 (Tr. 2:474-475). Based on the manager's attitude, both Ms. Poole and Mr. Batts stated that they believed they had an apartment to rent, and that they only needed to pick up keys and pay a deposit later (Tr. 2:478-479, 521). After they left, Mr. Batts and Ms. Poole obtained prices for a rental truck to move their belongings and spoke to Ms. Poole's relatives and friends about assistance with moving (Tr. 2:478-479, 522-523).

Ms. Ragan testified that she told Ms. Turner that she had applicants who had good jobs and she thought they would keep the apartment clean (Tr. 2:582). Ms. Turner asked if the applicants were black. Ms. Ragan testified that when she said "yes," Ms. Turner responded, "[n]o, no niggers whatsoever" (Tr. 2:582-583).

When Mr. Batts and Ms. Poole returned later that day, Ms. Ragan told them that the apartments were already rented (Tr. 2:480, 523). It appeared to Ms. Poole that the manager "felt real bad about the whole situation" (Tr. 2:525). Mr. Batts did

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[6](...continued)

sufficient facts to support the jury's determination that at least one apartment was available, and Mr. Batts and Ms. Poole were denied this or any apartment on the basis of their race.

not believe Ms. Ragan was being truthful when she said no apartment was available; he believed they were rejected for racial reasons (Tr. 2:480-481).

2. Ms. Cynthia Williams

Ms. Cynthia Williams, who is white, sought an apartment for herself and two of her children, one of whom is biracial because her former husband is black (Tr. 2:350, 354).[7] In October 1994, Ms. Williams received housing assistance through the Department of Housing and Urban Development's (HUD's) Section 8 program (Tr. 2:353). Section 8 provides financial assistance for private housing to low income and moderate income families (Tr. 2:444, 3:664).

On October 19, 1994, Ms. Williams went to Oak Manor seeking a rental apartment because Oak Manor was on a list of Section 8 housing provided by the Housing Authority (Tr. 2:354-355). Initially, Ms. Williams contacted Ms. Ragan, the rental manager, by telephone and learned that there was a vacancy (Tr. 2:356). Both Ms. Ragan and Ms. Williams testified that, upon Ms. Williams' arrival at the office, she completed an application and gave it to Ms. Ragan (Tr. 2:357, 584, 622). While filling out the application, Ms. Williams testified, she asked Ms. Ragan if there would be any problems because her son was of mixed race

[7] At the time of trial, Ms. Williams was known as Ms. Parks, and witnesses referred to her as Ms. Parks.

(Tr. 2:360, 401-402). She stated that Ms. Ragan responded that it was not a problem for her, but it was a problem for the owners (Tr. 2:360).

Ms. Ragan showed Ms. Williams an apartment (Tr. 2:357, 400-401, 583, 622). Both Ms. Ragan and Ms. Williams testified that Ms. Ragan filled out a HUD Request for Inspection (RFI) form that was provided by Ms. Williams (Tr. 2:358-359, 584-585, 622).[8] Before leaving, Ms. Williams told Ms. Ragan that she would be back the next day to pick up the keys and leave a deposit (2:359, 403). Ms. Ragan did not request a deposit on October 19. (Tr. 2:359, 406). Ms. Williams left with the understanding that she would be able to rent the apartment (Tr. 2:361, 406).

According to Ms. Williams, she returned to Oak Manor the next day and was greeted in the parking lot by Ms. Ragan and a man (Tr. 2:361, 407). Ms. Williams, with the cash deposit in her hands, told Ms. Ragan that she was there to pick up her keys and give her deposit (2:362, 407). Both Ms. Williams and Ms. Ragan testified that Ms. Ragan informed her at that time that she would not be able to rent the apartment because of her credit

[8] A rental agent will complete an RFI if he/she has an apartment available and is willing to rent to the Section 8 applicant (Tr. 2:450, 460). Ms. Williams submitted the RFI for Oak Manor to the Housing Authority on October 19, 1994 (Tr. 2:359, 449-450). Upon receipt of an RFI, the local Housing Authority inspects the prospective Section 8 apartment prior to agreeing to pay the rent (Tr. 2:450).

references (Tr. 2:362, 407-408, 586).[9]

The following day, October 21, 1994, at Ms. Ragan's initiative, Ms. Williams spoke to Ms. Ragan by telephone. Both women testified that Ms. Ragan informed Ms. Williams that the real reason she was rejected for the apartment was because of her biracial son (Tr. 2:365-366, 410, see 2:586). Ms. Williams recalled that Ms. Ragan also explained that she could not say the real reason the day before when Ms. Williams was at the parking lot because the man who was with her was Dr. Dooley (2:366, 410-411). Ms. Ragan testified that Ms. Turner had told Ms. Ragan that she could not rent to Ms. Williams because of her biracial son and because her ex-husband, who is black, would "hang around" (Tr. 2:584, 586).[10]

Mr. Michael Fuchtman, a Fort Smith/Sebastian County Housing

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[9] Ms. Williams did not recall identifying any credit references on her application (Tr. 2:362). The only other testimony regarding applicants' credit references was by Ms. Turner, who stated that Big D employees did not check credit references prior to approving rental applications (Tr. 4:985).

[10] Big D and Dr. Dooley have not produced any rejected applications, including applications that Ms. Williams and Ms. Poole stated they completed. Big D and Dr. Dooley stated that they did not retain such records, and virtually all records for this time period were destroyed while in storage (Tr. 3:658-660).

Ms. Williams also went to Park Terrace to complete an application for an apartment right before she went to Oak Manor (Tr. 2:369). She was told there were no apartments immediately available because they were remodeling, but that she should come back in a few days. When she returned, she was told that the apartments were for seniors only, so they were not available for her (Tr. 2:369). At the time she went to Park Terrace, her then husband and children were in the car (Tr. 2:369-370).

Authority employee, made two notations on October 19, 1994, in Ms. Williams' Housing Authority file. The notations read, "10/19/94 Brought in RFI for Oak Manor. 10/19/94 PM- Mgr [Manager] will not rent to her. MF" (Tr. 2:449-450, U.S. Exh. 6). Ms. Ragan testified that when a HUD employee contacted her to schedule an inspection of the apartment for Ms. Williams, she informed the person that the owner rejected Ms. Williams because of "a reference problem" (Tr. 2:585).

Ms. Williams reported the incident to Mr. Charles Rainey at the Fort Smith/Sebastian County Housing Authority and filed a complaint with HUD dated October 25, 1994 (Tr. 2:367, 414-415, App. Apx. 93/App. Exh. 5). Ms. Williams also filed an amended complaint (Tr. 2:433, App. Apx. 94/App. Exh. 6). Ms. Ragan also reported the incident regarding Ms. Williams to the Housing Authority on October 24, 1994 (Tr. 3:665). She met with Mr. Charles Rainey, the former Assistant Section 8 Coordinator for the Housing Authority, at her Oak Manor office and prepared and signed three statements regarding the incidents with Ms. Williams, and Mr. Batts and Ms. Poole (Tr. 2:588, 3:663, 665, 667, 669, 671, U.S. Exh. 10-12).

A lease between Big D and Mr. Joel Calderon was executed for the apartment that both Ms. Williams and Mr. Batts and Ms. Poole were considering on October 19 and 20, 1994 (Tr. 2:590, U.S. Exh. 8). The lease was executed after Ms. Williams and Mr. Batts and Ms. Poole were rejected (Tr. 2:590). Beginning in late 1994,

after Big D and Dr. Dooley received notice of Ms. Williams' HUD complaint, more blacks became tenants at Big D's properties (See e.g., Tr. 3:762, 785).

At the time of trial, Dr. Dooley had a personal net worth of $2,063,324. Big D had a net worth of $1,514,530 (Tr. 3:713).

SUMMARY OF ARGUMENT

Appellants have not raised any argument that warrants a reversal of the jury's verdict, a new trial, or a reduction in the punitive damages award. Initially, appellants challenge the sufficiency of the evidence. They repeat the arguments made to the jury and ignore the jury's credibility determinations. The record is replete with direct evidence that Big D and Dr. Dooley had a policy of denying rental apartments to black apartment seekers, and resident managers testified that they implemented this policy. Further, Big D and Dr. Dooley merely argued that the United States' witnesses were not telling the truth. Because Big D and Dr. Dooley failed to present an alternative, legitimate reason for denying an apartment to Ms. Williams, the district court did not abuse its discretion in denying a mixed motive instruction.

In addition, the jury's punitive damages awards of $50,000 against each defendant for the identified victims is reasonable and consistent with due process. Big D and Dr. Dooley engaged in repeated, intentional discrimination that reflects a callous disregard for civil rights protections in effect for 25 years. Both Big D and Dr. Dooley have substantial wealth. Given that

the awards are identical to the allowable civil penalties, these awards should be affirmed.

The district court did not abuse its discretion in three challenged evidentiary rulings. The district court properly barred an administrative determination regarding a matter unrelated to this suit in time, type of claim, and parties. Second, the court properly denied admission of the United States' investigative efforts since such methods have no bearing on the merits of the claim. Further, appellants were properly barred from presenting testimony from a witness who could have been, but was not, identified prior to trial.

Big D and Dr. Dooley not only waived any statute of limitations claim by raising it for the first time post-trial, but this claim also has no merit as they rely upon the wrong provision of the FHA. Finally, the district court did not abuse its discretion in charging Big D and Dr. Dooley $1,899 in costs associated with a meritorious motion to compel production and discovery responses by them.

ARGUMENT

I

THERE IS AMPLE EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT DEFENDANTS HAD A POLICY OF DENYING APARTMENTS TO BLACKS

Appellants contend that there is insufficient evidence to support the jury's verdict. Appellants, however, merely reiterate their version of the facts and challenge the integrity of the United States' witnesses. The jury considered and rejected appellants' proffered defenses, found the United States'

witnesses to be credible, and reasonably concluded that Big D and Dr. Dooley consistently denied rental apartments to black applicants because of their race. See Big D, 11 F. Supp.2d at 1054.

A defendant seeking to reverse a jury verdict bears a heavy burden. This court must review the evidence in the light most favorable to the verdict, and may only reverse if it "conclude[s] that no reasonable juror could have returned a verdict for the non-moving party." Kim v. Nash Finch Co., 123 F.3d 1046, 1057 (8th Cir. 1997); see Nicks v. Missouri, 67 F.3d 699, 704 (8th Cir. 1995). Further, this court may not re-evaluate the credibility of witnesses. See United States v. Triplett, 104 F.3d 1074, 1080 (8th Cir.), cert. denied, 117 S. Ct. 1837 (1997); Nicks, 67 F.3d at 704.

A. The Evidence Demonstrates That Big D And Dr. Dooley Established And Implemented A Policy Of Denying Apartment Rentals To Black Apartment Seekers

To prove that a pattern or practice of discrimination exists, the United States must, and did, present evidence that "discrimination was the [defendants'] standard operating procedure -- the regular rather than the unusual practice." International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977), cited in United States v. Balistrieri, 981 F.2d 916, 929 (7th Cir. 1992), cert. denied, 510 U.S. 812 (1993).

Admissions of a policy and its effectuation, such as here, constitute direct evidence of intentional discrimination. See United States v. L & H Land Corp., 407 F. Supp. 576, 580 (S.D.

Fla. 1976); see also Gray v. University of Ark., 883 F.2d 1394, 1398 (8th Cir. 1989). These admissions alone establish a pattern or practice, and it is unnecessary for the United States to prove specific occasions on which the discriminatory policy was carried out. See United States v. City of Parma, 494 F. Supp. 1049, 1095 (N.D. Ohio 1980), aff'd, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); United States v. Hughes Mem'l Home, 396 F. Supp. 544, 551 (W.D. Va. 1975).[11]

Even in the absence of admissions of discriminatory policies, the number of examples of discriminatory incidents need not be great, nor are the amount of such examples "determinative" to establish a pattern or practice. United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971) ("[N]o mathematical formula is workable, nor was any intended. Each case must turn on its own facts"); see United States v. Mintzes, 304 F. Supp. 1305, 1314-1315 (D. Md. 1969) (three incidents established a pattern or practice of blockbusting). The court in West Peachtree relied substantially on two rejected rental applicants, in addition to other evidence, to conclude that there was a pattern or practice of denying rentals to black applicants.

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[11] Witness testimony that a rental manager made several statements regarding her refusal to rent to blacks constitutes an admission and alone establishes a pattern or practice violation. See L & H Land Corp., 407 F. Supp. at 580; see also Johnson v. Hale, 13 F.3d 1351, 1354 (9th Cir. 1994) (defendant's single statement of refusal to rent to black applicants because of their race "itself confesses a pattern of discrimination"); United States v. Gregory, 871 F.2d 1239, 1243 (4th Cir. 1989) (Title VII violation); cert. denied, 493 U.S. 1020 (1990); United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 780 (N.D. Miss. 1972) (owner's statement of refusal to comply with military's nondiscriminatory housing policy constitutes admission of discrimination).

See 437 F.2d at 227-228.

In United States v. Pelzer Realty Co., 484 F.2d 438, 445 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974), the Fifth Circuit held that the defendant's actions were not isolated even though the evidence was limited to the defendant's refusal to sell in one transaction to two black prospective purchasers.

Id. at 441, 445. The court concluded that defendant's discrimination was a matter of deliberate policy; discriminatory comments were made by the defendant and his representatives; the defendant "had plenty of time to reflect" on his treatment of the victims; and he "was attentive to what was happening; nothing slipped by him." Id. at 445.

Here, viewing the evidence in the light most favorable to the United States, Big D and Dr. Dooley systematically denied rental apartments to black prospective tenants from approximately early 1993 to late 1994. Four apartment managers, Mr. Birdwell, Ms. McKown, Ms. Roberts, and Ms. Ragan, testified that they were instructed, and they implemented, Dr. Dooley and Big D's policy of denying rentals to blacks during 1993 and 1994 (Tr. 1:178-180, 229, 249, 2:582). Two members of Big D's office staff, Ms. Cox and Ms. Moore, testified that they informed the current managers of the same instructions from Dr. Dooley (Tr. 1:113-114, 159, 2:328-329). Each statement by Dr. Dooley and the resident managers regarding the policy and its implementation constitutes an admission, and independently establishes a pattern or practice violation. See e.g., Hughes, 396 F. Supp. at 551.

Here, the record is replete with orders and admissions of how the discriminatory policy was effectuated. Ms. Turner specifically ordered Ms. Ragan not to rent to the identified victims; Mr. Batts, Ms. Poole, and Ms. Williams (Tr. 2:582-584, 586). Resident managers Mr. Birdwell, Ms. McKown, and Ms. Roberts testified that they followed Dr. Dooley's instructions by lying about apartment availability or not considering applications submitted by black applicants. This evidence, individually and collectively, establishes the pattern or practice violation alleged by the United States. See Pelzer, 484 F.2d at 445; L & H Land Corp., 407 F. Supp. at 580.

The specific rejections of Mr. Batts, Ms. Poole, and Ms. Williams, and examples by Mr. Birdwell, Ms. McKown, and Ms. Roberts of how other unnamed persons were victims of discriminatory treatment are additional evidence that defendants engaged in a pattern or practice of discrimination. The witnesses need not be able to name the other specific victims in order to show that blacks were rejected pursuant to a policy. See Real Estate Dev. Corp., 347 F. Supp. at 783 (identity of persons rejected due to discriminatory pattern or practice is "immaterial").

Defendants contend (Br. 19) that the presence of a few black tenants refutes the existence of a pattern or practice of exclusion. This is not an accurate statement of the law. The exclusion of blacks need not be absolute to constitute a pattern or practice violation. See Catlett v. Missouri Highway & Transp.

Comm'n, 828 F.2d 1260, 1266 (8th Cir. 1987) ("[v]ictims of a discriminatory [hiring] policy cannot be told they have not been wronged because other [members of the class] have been hired"), cert. denied, 485 U.S. 1021 (1988); United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1293 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

B. The Evidence Demonstrates That Big D And Dr. Dooley Denied An Apartment To Cynthia Williams Because Of Her Biracial Son

The United States' claim with respect to Ms. Williams is brought pursuant to 42 U.S.C. 3612(o). The jury's verdict is supported by direct evidence that Ms. Williams was denied an apartment at Oak Manor because of her biracial son. When there is direct evidence of discrimination, and the jury believes such evidence, as was the case here, a violation is proven. See Perry v. Kunz, 878 F.2d 1056 (8th Cir. 1989) (ADEA claim).

Ms. Williams applied for an apartment at Oak Manor in October 1994 (Tr. 2:357, 584). Ms. Ragan testified that because of Ms. Turner's instructions, she was forced to reject Ms. Williams for the apartment. Ms. Turner told Ms. Ragan that she would not allow Ms. Williams to rent an apartment because of her biracial son (Tr. 2:586). Ms. Ragan's testimony at trial is consistent with her statements to Mr. Rainey, which were made within a few days of the events in question (see Tr. 3:665, 667, 669, 671, U.S. Exh. 10-12).[12]

The jury's assessments of the witnesses' credibility played a critical role in its verdict. As stated above, such determinations are in the sole province of the jury and cannot be

[12] Big D and Dr. Dooley incorrectly assert (Br. 14) that Ms. Williams had a new RFI on October 20, 1994, the day of her second visit to Oak Manor, and that this reflects Ms. Williams' own understanding that she was rejected by Oak Manor, and is inconsistent with her other testimony. In fact, the entry in Ms. Williams' Housing Authority file for October 20, 1994, reads, "Ms. Parks picked up another RFI" (Tr. 2:450-451, U.S. Exh. 6). Ms. Williams needed a new, blank RFI form in order to pursue other rental opportunities, just as she needed a blank RFI form to be completed by Ms. Ragan for Oak Manor (Tr. 2:450-451).

second-guessed by this court. See Triplett, 104 F.3d at 1080. After considering conflicting testimony, the jury reasonably concluded, based on overwhelming evidence, that Big D and Dr. Dooley consistently denied rental opportunities to black apartment seekers, and that Big D and Dr. Dooley specifically denied rentals to Ms. Williams, Ms. Poole, and Mr. Batts because of race.[13] See Nash Finch Co., 123 F.3d at 1059.

II

APPELLANTS DID NOT PRESENT EVIDENCE OF A MIXED MOTIVE DECISION AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED A MIXED MOTIVE JURY INSTRUCTION

Appellants contend (Br. 21-26) that the court erred in denying a mixed motive jury instruction. Appellants' evidence, however, did not support a mixed motive instruction.[14] Reviewing

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[13] Appellants attack the credibility of certain witnesses (Br. 11-14), including the identified victims and Ms. Ragan, based on "after-acquired" evidence, that is, evidence that defendants did not even know about until years after they denied apartments to Ms. Poole, Mr. Batts, and Ms. Williams. The "after-acquired" evidence includes prior convictions of witnesses and the eviction of Mr. Batts and Ms. Poole by a prior landlord. Defendants are careful not to point to such matters as specific reasons for the denial of apartments, but include them in an apparent effort to create a picture adverse to the government's case. Defendants critically fail to inform this court, however, that defendants were not aware of these facts at the time of their decision to deny apartments to the identified victims. A defendant cannot argue that facts not known at the time of its decision to discriminate are evidence that the decision was not discriminatory. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 359-360 (1995). Further, even with knowledge of prior convictions, the jury unequivocally determined that these witnesses, individually and collectively, were more credible than Dr. Dooley and witnesses proffered by Dr. Dooley and Big D.

[14] Because there was no evidentiary basis in this case for a mixed motive instruction, this court need not address the threshold question of whether the mixed motive instruction of

(continued...)

the district court's action for an abuse of discretion, a party is entitled to a jury instruction if there is a timely request and "the proffered instruction is supported by the evidence and correctly states the law." United States v. Montgomery, 819 F.2d 847, 851-852 (8th Cir. 1987); Federal Enters. Inc. v. Greyhound Leasing & Fin. Corp., 786 F.2d 817, 820 (8th Cir. 1986).

A mixed motive exists when a defendant's decision is made on the basis of both illegitimate and other factors. See Price Waterhouse, 490 U.S. at 247. In an employment context, a mixed motive jury instruction is appropriate when a defendant identifies an alternative, simultaneous reason that would justify the same action, even without impermissible considerations. See id. at 245-247, 252.

At the close of the evidence, the district court considered giving a mixed motive jury instruction with respect to the claim on behalf of Ms. Williams. The court ultimately determined, however, that there was not a factual basis in the evidence for this instruction (Tr. 4:1063-1074). The district court properly concluded that Big D and Dr. Dooley failed to submit any evidence that there was any reason in addition to race for their rejection of Ms. Williams; they solely argued that Ms. Williams was not telling the truth (Tr. 4:1073). As explained by the district court (Tr. 4:1073):

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[14](...continued)
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality), applies to housing discrimination claims. Accordingly, the United States has not briefed this issue.

> the Court agrees that not only because the defendants did not ever take the position that they knew why [Ms. Williams] was not allowed to rent, there has been absolutely no evidence, no burden has been carried at all that raises any possibility other than that you shouldn't believe [Ms. Williams] that this occurred. Obviously it is a very good jury question about whether they believe her or not. In other words, whether that happened or not. But there is not any evidence from which the jury could say, well, what the defendants said was that they did it because of so and so. There is just nothing in the record at all that shows what the defendant's excuse was and that's of course recorded and amplified by the requests [for admission].[15]

Significantly, Big D and Dr. Dooley did not present a single witness who stated that Ms. Williams was not considered for a rental because she never completed Big D's application. Ms. Williams testified that she did fill out an application. Defendants only argue that a contrary inference can be drawn because she did not recall identifying all of the items listed on a Big D application (Tr. 2:362, 391). Counsel's argument alone is not a sufficient evidentiary basis to argue that a mixed motive instruction applies. Price Waterhouse, 490 U.S. at 246 (plurality) (appellant's burden "is most appropriately deemed an affirmative defense"); see Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.9 (1981) (A presumption established by a prima facie case is not rebutted by "[a]n articulation not

[15] In their Amended Joint Answer to Requests for Admissions, Big D and Dr. Dooley denied that Ms. Williams attempted to rent an apartment at Oak Manor (R. 87 at 2/U.S. Apx. 31). Thus, at trial and on appeal, appellants argue a different theory than their admission.

admitted into evidence[.] Thus, the defendant cannot meet its burden merely * * * by argument of counsel"); Denton v. International Bhd. of Boilermakers, 650 F. Supp. 1151, 1160 (D. Mass. 1986) (no basis to conclude mixed motive for employer where "there is an absence of evidence of a legitimate motive").

Further, even if the court concludes Big D and Dr. Dooley submitted sufficient evidence of why they rejected Ms. Williams, this evidence does not constitute a mixed motive. Big D and Dr. Dooley's evidence was intended to contradict the United States' witnesses' testimony; it did not present an alternative basis for the same action. When a defendant challenges the veracity of plaintiff's theory, the defendant is not presenting a "mixed motive" defense. See Bachman v. St. Monica's Congregation, 902 F.2d 1259, 1263 (7th Cir. 1990).

In Bachman, plaintiffs alleged that defendant failed to sell them property because of their Jewish ancestry. Defendants asserted that they sold the house to another buyer because of a higher purchase price. Id. at 1260. The Seventh Circuit concluded that a mixed motive instruction was not appropriate because "causation was not even an issue in this case." Id. at 1263. As explained by Judge Posner,

> "[t]his was not a mixed-motives case such as Price Waterhouse, in which it is necessary to decide whether, but for the bad motive, the transaction sought by the plaintiff would have gone through. * * * If the jury believed the plaintiffs, the only cause for the [defendant's] refusing to sell them the house was their

> race, while if the jury believed the defendants[,] the plaintiff's Jewishness had nothing to do with the refusal. It was a binary choice, leaving no room for causally inefficacious discrimination.

Ibid.

Here, by contending that Ms. Williams never filled out Big D's rental application form, Big D and Dr. Dooley simply are asserting that Ms. Williams' version of the facts, and the testimony of their own former employees, is untrue. Big D and Dr. Dooley are not offering an alternative, nondiscriminatory explanation for their actions that is in addition to the United States' theory. Like the defendants in Bachman, Big D and Dr. Dooley's' theory presented a "binary choice" rather than a mixed motive issue for the jury; either they believed Ms. Williams or they believed Big D and Dr. Dooley. See Bachman, 902 F.2d at 1263.[16] Accordingly, the district court did not abuse its

[16] After relentlessly assaulting the credibility of Ms. Ragan (Br. 25), appellants attempt to identify one statement by Ms. Ragan, which she herself stated was a lie, as a basis for a mixed motive instruction. Ms. Ragan testified that she initially lied to Ms. Williams and said she was rejected because of her references. It is uncontested that Ms. Ragan later told Ms. Williams that the comment about references was a lie, and that the real reason she was rejected was because of the race of her biracial son (Tr. 2:365-366, 410, 586). This testimony should be rejected as insufficient evidence of a mixed motive to warrant a jury instruction. There is no evidence to suggest that the comment about references is an actual reason for Big D and Dr. Dooley's rejection of Ms. Williams, and they never argued that this should be the basis of a mixed motive instruction (Tr. 4:1069-1070).

discretion in denying a mixed motive instruction.[17]

III

THE PUNITIVE DAMAGES AWARD SHOULD STAND

Big D and Dr. Dooley challenge the introduction of evidence of their financial worth, assert that state law controls the assessment of damages, and argue that the jury's award of $50,000 against each defendant violates due process. Each argument is without merit.

A. Federal Law Governs The Admissibility Of Defendants' Financial Wealth And The Assessment Of Punitive Damages Under The Fair Housing Act

At trial, Big D and Dr. Dooley objected to the introduction of each defendant's financial worth solely on the grounds that the United States had not made out its prima facie case of either defendant's liability for punitive damages (Tr. 3:694-695). Big D

[17] In addition, Big D and Dr. Dooley argue for the first time on appeal that a mixed motive instruction should apply to the jury's consideration of relief for Mr. Batts and Ms. Poole. At the time of trial, Big D and Dr. Dooley argued that a mixed motive instruction was warranted solely with respect to Ms. Williams (Tr. 4:1079-1080). Therefore, they have waived this argument with respect to Mr. Batts and Ms. Poole. See Horstmyer v. Black & Decker, Inc., 151 F.3d 765, 770-771 (8th Cir. 1998) (collecting cases). The court's original instruction No. 9 and Interrogatory 1, which Big D and Dr. Dooley specifically address, solely concern Ms. Williams.

To the extent a mixed motive instruction is considered with respect to a pattern or practice claim, it would apply to the assessment of individual relief, rather than the government's unrebutted proof of liability by the existence of Big D and Dr. Dooley's policy. See Teamsters, 431 U.S. at 360-362. Here, however, if considered on the merits, Dr. Dooley and Big D's claims for a mixed motive instruction with respect to their treatment of Ms. Poole and Mr. Batts should be rejected for the same reasons that this instruction has no factual basis to Ms. Williams' claim. Big D and Dr. Dooley only argue that Mr. Batts and Ms. Poole failed to submit a completed application.

and Dr. Dooley asserted for the first time in their motion for a new trial or remittitur, and again here (Br. 26-28), that evidence regarding the wealth of Big D impermissibly influenced the jury's punitive damages verdicts against Dr. Dooley, and vice versa. Appellants did not object to the introduction of this evidence on this basis in the district court. The claim they advance here, therefore, is procedurally barred. McKnight By and Through Ludwig v. Johnson Controls, Inc., 36 F.3d 1396, 1407 (8th Cir. 1994), citing Owen v. Patton, 925 F.2d 1111, 1115 (8th Cir. 1991) (objection to evidence on one ground does not preserve argument that it should have been excluded on other grounds).

Moreover, Big D and Dr. Dooley's contention that the admissibility of their respective financial worth is governed by Arkansas law is erroneous. Consistent with federal law, the district court appropriately admitted Dr. Dooley and Big D's financial worth as part of the evidence for punitive damages. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981). Further, the jury appropriately determined punitive damages separately against Big D and Dr. Dooley based on each one's specific circumstances (Tr. 4:1161-1162). See McFadden v. Sanchez, 710 F.2d 907, 912-914 & n.6 (2d Cir.), cert. denied, 464 U.S. 961 (1983).

Big D and Dr. Dooley also fail to recognize the body of case law developed under the FHA regarding the award of punitive damages. See e.g., Littlefield v. McGuffey, 954 F.2d 1337, 1349

(7th Cir. 1992).[18] This court should, consistent with other courts, adopt the standard set forth by the Supreme Court in Smith v. Wade, 461 U.S. 30, 51, 56 (1983), in FHA cases:

> punitive damages are recoverable for intentional discrimination, malice, an evil motive, or recklessness or callous indifference to a federally protected right.

See, e.g., Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 909 (2d Cir. 1993); Balistrieri, 981 F.2d at 936 (error for court to direct verdict on punitive damages in light of evidence that defendants "consciously and intentionally discriminated against potential black renters"); Asbury v. Brougham, 866 F.2d 1276, 1283 (10th Cir. 1989); see also Littlefield, 954 F.2d at 1345, 1349 (punitive damages assessed under FHA and 42 U.S.C. 1982 based on repeated acts of intentional discrimination, including harassment of plaintiff and plaintiff's family); Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 191 (7th Cir. 1982) (evaluate willfulness and intentional acts to assess punitive damages under FHA and 42 U.S.C. 1982); Robert G. Schwemm, Housing Discrimination: Law and Litigation, § 25.3(3)(b) (1990 & Supp. 1997). Consistent with this case law, the jury specifically found that each defendant "acted with malice or reckless

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[18] Where a cause of action arises out of a federal statute, federal law governs the scope of the remedy available to plaintiffs. See Burnett v. Grattan, 468 U.S. 42, 55 n.18 (1984); F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 127 (1974). Federal law, therefore, controls damage determinations for a federal cause of action. See, e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238-240 (1969).

indifference to the rights of African Americans not to be discriminated against on the basis of race" (Tr. 4:1161).

B. The Award Is Fair And Consistent With Due Process

Appellants contend that the jury's award of punitive damages is excessive and violates their rights to due process under the Fourteenth Amendment. In fact, the jury's punitive award reflects restraint and an appropriate degree of punishment and deterrence given Dr. Dooley and Big D's egregious, discriminatory acts and callous disregard of federal rights, and their respective, substantial wealth.

In addition to considering the fairness of the process of assessing damages and the defendant's wealth, the Supreme Court has identified three factors to assess whether a punitive damages award is so excessive as to violate due process: (1) the degree of reprehensibility of defendants' conduct, (2) the ratio between the actual and potential harm and the size of the award, and (3) the availability of sanctions in comparable situations.[19] See BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996). The jury's punitive damage award of $50,000 against each defendant falls well within the range of fairness and due

[19] "[A] judgment that is a product of [fair procedures] is entitled to a strong presumption of validity." Dean v. Olibas, 129 F.3d 1001, 1006 (8th Cir. 1997) (emphasis added; citing TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 457 (1993)). Here, the jurors were selected fairly, they heard all of the evidence, and they were instructed on the law. In response to appellant's post-trial motion, the court fully considered Big D and Dr. Dooley's arguments, and upheld the constitutionality of the award. See Dean, 129 F.3d at 1007; Big D, 11 F. Supp.2d at 1052-1054.

process. The jury concluded that Big D and Dr. Dooley engaged in repeated, discriminatory denials of rentals that reflected malice and a callous disregard of federal rights secured 25 years earlier. Due attention was given to the actual harm inflicted on Ms. Williams, Mr. Batts, and Ms. Poole, as well as the actual and potential harm inflicted on other victims of lies and rejection based on race. Further, the jury properly considered Big D and Dr. Dooley's substantial wealth in identifying a fair amount that serves as punishment for their acts as well as deterrence for them and others with similar responsibilities. Significantly, this award also is wholly consistent with the FHA's award of civil penalties. See ibid.; 42 U.S.C. 3614(d)(1)(C).

1. Defendants' Intentional Violation Of Individuals' Rights To Fair Housing Constitutes Severe, Reprehensible Conduct That Warrants The Punitive Damages Award Of $50,000 Against Each Defendant

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." BMW, 517 U.S. at 575. In assessing reprehensibility, this court should examine the nature of the injury, the extent to which the defendant engaged in repeated, unlawful behavior, the presence (or absence) of a "safe harbor," the presence of bad faith, and the presence of misconduct either through "deliberate false statements * * * or concealment of evidence of improper motive." Id. at 575-579. In BMW, where plaintiff challenged BMW's practice of not disclosing minor paint repairs on "new" vehicles, none of these factors supported a finding of egregious or highly reprehensible conduct. The

defendant acted in compliance with state law, ceased its behavior upon a finding of unlawfulness, and, in good faith, believed that it was acting legally in withholding information, rather than engaging in any affirmative false or misleading statements. See ibid.

The circumstances here are in sharp contrast to those in BMW. Here, several factors individually and collectively establish a high degree of reprehensibility and egregious conduct by Big D and Dr. Dooley sufficient to warrant the jury's punitive damages awards. The record overwhelmingly establishes that Big D and Dr. Dooley engaged in a pattern of intentional discrimination that denied rental housing to black, prospective tenants (see e.g., Tr. 1:179-180, 215-216, 229). Pursuant to Dr. Dooley's orders, managers deliberately lied to black apartment seekers about the lack of available rentals and did not consider their applications submitted by black applicants (See e.g., Tr. 1:178-180, 229). Defendants hid their discriminatory treatment of black apartment seekers through polite treatment or false pretenses (Tr. 1:180, 249-250). See Dean, 129 F.3d at 1007 (in assessing factors to support "substantial punitive damages * * *[m]ost important, his conduct was intentional").

In addition, Big D and Dr. Dooley's conduct was in knowing violation of civil rights legislation in effect for 25 years (e.g., Tr. 1:180, 2:346, 3:674). They cannot have had any illusion that their conduct was lawful. See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (private housing discrimination is

unlawful); 42 U.S.C. 3601 ("[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States"). In fact, Big D and Dr. Dooley continued to bar blacks from rentals even after the Sebastian County Housing Authority contacted Dr. Dooley regarding the very policy challenged here (Tr. 3:674). Further, even after Big D and Dr. Dooley received notice of Ms. Williams' complaint, Big D and Dr. Dooley continued to instruct employees not to rent

to blacks (App. Apx. 106/App. Exh. 12). As the Supreme Court explained, "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." BMW, 517 U.S. at 576-577.

Big D and Dr. Dooley's actions are not only intentional, but also reflect a malice or "callous disregard" for the civil rights of others to warrant a substantive punitive award. See Asbury, 866 F.2d at 1282-1283 (managing partner's policy of barring blacks from rentals and his acceptance of employee's actions pursuant to policy reflected callous indifference to justify $50,000 punitive award); see also Hughes v. Dyer, 378 F. Supp. 1305, 1311 (W.D. Mo. 1974). After considering the evidence, the jury specifically concluded that Big D and Dr. Dooley "acted with malice or reckless indifference to the rights of African Americans not to be discriminated against on the basis of race" (Tr. 4:1161, App. Add. 4).

The jury's award also is consistent with other housing cases where punitive damages are awarded for intentional discrimination or action that reflects a callous indifference to an individual's rights. See, e.g., Littlefield, 954 F.2d at 1349 (intentional, racial discrimination against renter and subsequent harassment supported $100,000 punitive damage award); Hunter Trails, 685 F.2d at 191 ($50,000 punitive damage award each to a husband and wife upheld due to "ample evidence of intentional disregard" by

defendant of civil rights of plaintiffs). As in those cases, the "willfulness" of Big D and Dr. Dooley's conduct was "appropriately weighed" in the assessment of punitive damages. Ibid.; see Douglas v. Metro Rental Servs. Inc., 827 F.2d 252, 257 (7th Cir. 1987) ($20,000 punitive damages award against rental company with default judgment for deterrence objective because owner, not rental company, intentionally discriminated).

Appellants' assessment of reprehensibility focuses predominantly, if not solely, on the harm inflicted upon and suffered by the plaintiff, and compares this case to more detailed instances of discrimination in an effort to reduce the damages award.[20] Appellants' arguments are misdirected. First, a suggestion that substantive punitive damages are only appropriate in employment discrimination is wrong. The need to punish and deter persons and entities that engage in housing

[20] The majority of cases appellants cite assess punitive damage awards under various state laws or state constitutions. Appellants ignore that the sole standard for this court is whether the awards violate the due process clause of the Fourteenth Amendment, as assessed by BMW, supra, and its progeny.

discrimination is no less important than in an employment context. The discriminatory denial of rentals has consequences for identified victims; but it also has "substantial societal costs." Johnson v. Hale, 13 F.3d 1351, 1354 (9th Cir. 1994) (addressing compensatory damages under 42 U.S.C. 1982). Further, by placing undue reliance on the degree of harm inflicted upon the identified victims, Big D and Dr. Dooley's discussion is more akin to an analysis of compensatory damages, which concerns harm

suffered, rather than punitive damages, which focus upon the illegal conduct of the defendant. See Metro Rental, 827 F.2d at 257.

2. The Relationship Of Punitive Damages To Actual And Potential Harm Is Fair And Reasonable

Big D and Dr. Dooley assert that the jury's award should be reduced given the disparity between the punitive damages and the compensatory damages awarded the identified victims. Appellants fail to consider all of the factors relevant to this analysis, particularly the importance of deterrence.

In assessing the amount of a punitive damage award, this court must examine the ratio between the punitive damage award and the actual and potential harm of Big D and Dr. Dooley's conduct. See BMW, 517 U.S. at 581; TXO, 509 U.S. at 460; Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991). The Supreme Court rejects a "categorical" approach or a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." BMW, 517 U.S. at 582-583, (citing TXO, 509 U.S. at 458). The Court

recognizes that different circumstances require flexibility in this ratio analysis:

> low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Id. at 582.

This case epitomizes the reasons the Supreme Court cites for not imposing a strict, mathematical formula. Here, as in most housing cases, repeated acts of intentional discrimination caused minimal economic injury to individuals, but has grave societal costs. See Schwemm, supra, § 25.3(2)(b). That was true here. Mr. Williams, Mr. Batts, and Ms. Poole testified to emotional injuries, including humiliation and embarrassment, which are difficult to assess in financial terms (See Tr. 2:371, 428-429, 513-514, 523-525). Accordingly, it is not surprising that the ratio is high -- 50:1 for each defendant for each set of victims. Ms. Williams and her children, and Mr. Batts and Ms. Poole each were awarded $500 compensatory damages and $50,000 punitive damages. While admittedly large, this is by no means beyond the pale of due process protection that the Supreme Court envisioned in BMW. See 517 U.S. at 582.[21]

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[21] The Supreme Court has upheld ratios of 10:1 for potential harm, and 526:1 for actual harm, see TXO, 509 U.S. at 459-462, although it also has stated that a ratio of 4:1 for actual harm "may be close to the line," Haslip, 499 U.S. at 23. See also Dean, 129 F.3d at 1007 (upheld 14:1 ratio for actual harm; $5,000 compensatory and $70,000 punitive damages).

The fact that housing discrimination can continue to be practiced in subtle terms, by means that applicants have no way of knowing, demands punishment and deterrence at least as much as, if not more than, blatant acts that occur in daily business contacts. As this case demonstrates, polite behavior that masks discriminatory treatment, minimal contacts between the parties, and other factors make it difficult to rout out discriminatory treatment in housing. Beyond harm to the identified victims, the potential harm extended to other unnamed victims that managers rejected through lies or failure to consider their applications. The jury reasonably considered the need to deter not only Big D and Dr. Dooley, but others in similar business positions. See Dean, 129 F.3d at 1007. In housing discrimination cases involving a discriminatory refusal to rent, compensatory damages alone may not create a sufficient deterrent to further illegal conduct by owners and landlords. Punitive damages are necessary to deter such behavior in the future. Congress confirmed the importance of punitive damages when it specifically removed the $1,000 cap on punitive damages in private suits under the FHA in 1988. See 42 U.S.C. 3613(c)(1). No limit applies to actions by the United States. See 42 U.S.C. 3614(d).

Notwithstanding the ratio, the award of $50,000 per defendant is an appropriate punishment and deterrent given Big D's approximate net worth of $1.5 million, and Dr. Dooley's

approximate net worth of over $2 million.[22] In Hunter Trails, 685 F.2d at 191, the defendant's financial condition (bank balance of $100,000, annual cash flow of $142,000), and recognition that punitive damages would impose some "hardship" were considered in upholding $100,000 total punitive damage award to a couple. Since it is questionable that even the jury's restrained amount imposes any "hardship" on the Big D and Dr. Dooley, to reduce it would defeat the objectives of punitive damages.

3. The Total Punitive Damages Award Against Each Defendant Is Justified And Not Excessive Because It Is Identical To The Civil Penalty That Could Have Been Imposed

In determining the appropriate amount of punitive damages, "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." BMW, 517 U.S. at 583. This court should give "substantial deference" to the legislative sanctions imposed for the conduct at issue. Ibid. (internal quotations omitted). As part of the 1988 amendments to the FHA, Congress authorized courts to impose civil penalties in suits brought by the Attorney General, such as this case, "to vindicate the public interest" in an amount not exceeding $50,000 for a first violation. 42 U.S.C. 3614(d)(1)(c). This fine is

[22] The percentage of punitive damage awards as compared to companies worth multi-billion dollars decreases dramatically, as appellants' citations show (Br. 36). As discussed herein, these ratios should not be used as formulas for assessing punitive damages in this case. The question before this court is whether the ratio imposed here was reasonable given the circumstances and substantial wealth of the defendants.

permitted in addition to an award of compensatory and punitive damages. See ibid. While Big D and Dr. Dooley agree that the FHA's civil penalty provisions are an appropriate measure of the fairness of punitive awards, they cite incorrectly to a provision that applies only when an administrative law judge (ALJ) conducts hearings and determines relief for individual charges of discrimination. See 42 U.S.C. 3612(g)(3)(A). That section does not address remedies for a pattern or practice claim.[23]

Civil penalties and punitive damages serve the same purposes of punishment and deterrence. See Tull v. United States, 481 U.S. 412, 423 n.7 (1987); Balistrieri, 981 F.2d at 936. When rendering judgment, the district court specifically declined to award civil penalties due to the jury's punitive damages award (App. Add. 10-11). In denying defendants' post-trial motion, the court again stated that the size of the jury's punitive award was of "primary importance" in declining to assess civil penalties. See Big D, 11 F. Supp.2d at 1054; see also Balistrieri, 981 F.2d at 936 (court may consider punitive award in assessing civil penalty). Given that the statutory civil penalty is identical to the jury's award, this court should uphold the jury's punitive damages award.

In summary, courts have issued and upheld widely disparate punitive damage awards in fair housing cases, and this reflects

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[23] Big D and Dr. Dooley elected to have Ms. Williams' claim heard in federal court rather than before an ALJ. They cannot now try to avoid the consequences of their choice and the full authority of the United States to seek pattern and practice relief.

the unique, fact-specific analysis for each case. See Schwemm, supra, § 25.3(3)(d). The lack of substantial precedent of jury awards of this amount, however, should not lead the court to reduce this award.[24] The existence of procedural safeguards, and the unique combination of repeated, intentional discrimination by appellants in violation of laws over 25 years old, and their substantial wealth, supports the jury's considered, reasonable judgment of $25,000 punitive awards against Big D and Dr. Dooley for each set of identified victims.

IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN BARRING THE ADMISSION OF UNRELATED ADMINISTRATIVE FINDINGS, THE UNITED STATES' INVESTIGATIVE EFFORTS, AND A SURPRISE WITNESS

The standard of review of the district court's evidentiary rulings is abuse of discretion. See Hogan v. American Telephone & Telegraph Co., 812 F.2d 409, 410 (8th Cir. 1987); Smith v. Firestone Tire & Rubber Co., 755 F.2d 129, 134 (8th Cir. 1985). "Even with a clear showing of abuse, the error must have affected the substantial rights of the parties to warrant reversal of the district court." Hogan, 812 F.2d at 410.

A. The District Court Properly Excluded An Administrative Finding Regarding An Unrelated Matter

Appellants contend (Br. 39-42) that the district court erred when it barred the introduction of HUD's "no cause" administrative determination regarding a complaint against Big D

[24] As mentioned, until the 1988 Amendments, the FHA had a punitive damage award cap of $1,000. Thus, a review of past decisions has limited utility since courts and juries were bound by this limitation.

and Dr. Dooley by Mr. James Haynes, a person unrelated to this suit, and for actions both different in kind and later in time from those alleged here. The district court did not abuse its discretion in barring this evidence.[25]

This court has ruled that the admissibility of administrative determinations by the Equal Employment Opportunity Commission in employment discrimination cases rests with the sound discretion of the trial court. See Briseno v. Central Technical Community College Area, 739 F.2d 344, 347 (8th Cir. 1984); Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir.), cert. denied, 469 U.S. 1041 (1984). There is no basis for a different rule with respect to HUD cause determinations; both are subject to de novo review in the district court. See Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976); Yellow Freight Sys., 734 F.2d at 1309; Marinoff v. HUD, 892 F. Supp. 493, 494-496 (S.D.N.Y. 1995) (HUD determination subject to de novo review), aff'd on other grounds, 78 F.3d 64

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[25] The United States had filed a Motion in Limine, with supporting memorandum, to address the inadmissibility of the HUD Haynes determination. Before trial, the district court stated, without detailed explanation, that this evidence was inadmissible except for "some very certain circumstances" (Tr. 1:57). The court added, "[i]t's certainly not admissible just to show that the claim was determined to have no merit" (Tr. 1:57). The court took the United States' motion under advisement (Tr. 1:57-58). When defendants attempted to elicit testimony from Dr. Dooley on this matter, the district court barred such testimony (Tr. 3:936). While defendants assert (Br. 40) that the district court barred the testimony on grounds of relevancy, the court did not identify the basis for its ruling (Tr. 3:936). The court may have excluded this evidence as irrelevant or because of its prejudicial impact under Fed. R. Evid. 403, both of which were addressed in the United States' motion.

(2d Cir. 1996); 42 U.S.C. 3613(a)(2).

The HUD Haynes determination concerns an interracial couple who were tenants in Oak Manor (App. Apx. 107-111). The couple filed a complaint in February 1996 regarding their alleged harassment and eviction (App. Apx. 107-111). Mr. Haynes, who is black, was not identified as an individual entitled to relief by the United States, nor was he a witness in this case. While this case concerned the denial of rental opportunities, Mr. Haynes challenged the differential terms and conditions of his residency at Oak Manor (Mr. Haynes resided with his girlfriend, who was a tenant). Further, Mr. Haynes alleged disparate treatment that occurred at least one year after the United States alleges that Big D began ending their pattern or practice of discriminatory denials of apartments to blacks (App. Apx. 108). More significantly, because a HUD cause determination is not a final determination on the merits of a complaint, the Haynes determination is irrelevant to this case. See Marinoff, 892 F. Supp. at 495-496; 42 U.S.C. 3613(a)(2). Accordingly, since the factual basis for the Haynes complaint had no bearing on the facts of this case, it provided no possible basis to impeach the government's witnesses or refute the government's case.[26]

Further, the unquestionable, prejudicial effect of the HUD

[26] Defendants also contend (Br. 41) that evidence in the Haynes determination regarding the presence of black or interracial couples defeats the pattern or practice claim. Further, as discussed above, the United States does not contend blacks never lived at Oak Manor. The presence of black tenants does not refute a pattern or practice charge. See Catlett, 828 F.2d at 1266.

Haynes determination substantially outweighed any possible probative value, and the court did not abuse its discretion in excluding this document. The Eighth Circuit has repeatedly cautioned that Fed. R. Evid. 403 places substantial limitations on admissibility, especially in jury trials, where there is the possibility that the agency's nonbinding findings will be misinterpreted as "expert" conclusions and given undue weight.

Yellow Freight Sys., 734 F.2d at 1309; Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1105 (8th Cir. 1988); Strong v. Mercantile Trust Co., N.A., 816 F.2d 429, 431 (8th Cir. 1987), cert. denied, 484 U.S. 1030 (1988). Because of these concerns and undue prejudice, the Eighth Circuit has both upheld the exclusion of EEOC findings, see e.g., Yellow Freight Sys., 734 F.2d at 1309; Strong, 816 F.2d at 431, and found error in a district court's failure to exclude them. See e.g., Estes, 856 F.2d at 1105-1106. If the same matters which are being tried should be excluded under Rule 403 because of undue confusion and extension of time, there is even more reason to exclude nonbinding agency findings concerning matters which are not being tried, i.e., the Haynes determination.

Finally, the defendants are incorrect in asserting (Br. 41-42) that the allowance of one question and answer of Dr. Dooley, wherein Dr. Dooley volunteered the existence of other complaints, without further explanation, justifies the introduction of this evidence. (See Tr. 3:660). Defendants cannot introduce irrelevant evidence in an effort to cure their testimony.

Further, the existence of such testimony does not change the evidentiary status of the HUD Haynes determination from irrelevant to relevant, or from prejudicial to probative.

B. The District Court Did Not Abuse Its Discretion In Barring Introduction Of The United States' Investigative Methods

During the discovery phase of this case, the United States distributed a pamphlet that informed persons of the nature of this suit and solicited information (App. Add. 46-47).[27] No victims were identified by this process. Appellants assert (Br. 45-46) that the United States' inability to identify any victims through its distribution of this pamphlet is admissible, "negative" evidence of the absence of discriminatory treatment. Appellants also erroneously assert that if the jury knew that no victims were identified based on the United States' distribution of the pamphlet, it would have made a lower punitive damage award. The district court properly ruled that the distribution of the pamphlet and response thereto are investigative efforts that were not admissible at trial (Tr. 1:55-56).

The lack of response to this pamphlet does not mean that there were no other victims of appellants' discriminatory practices. Several other arguments are equally plausible. A

[27] In pattern or practice discrimination cases, when defendants have not kept records regarding rental inquiries that might lead to "aggrieved persons," 42 U.S.C. 3602(i), the United States occasionally distributes pamphlets or publishes notices of a lawsuit in order to seek additional information regarding alleged discriminatory practices. In addition, the district court expressly authorized the distribution of this pamphlet as an investigatory tool for the United States (R. 23 at 15-21/U.S. Apx. 15-21).

victim may not know of the pamphlet or investigation or she may not want to be involved in litigation because of negative feelings from any discrimination, lack of time, different priorities, or other reasons.

Further, Big D and Dr. Dooley argued at trial the same theory they seek to argue through the pamphlet: that the United States' failure to identify any victims other than Ms. Williams, Mr. Batts, and Ms. Poole does not establish a pattern or practice, or even if so, does not warrant substantive punitive damages (See e.g., Tr. 4:1110, 1115-1116).

C. The District Court Did Not Abuse Its Discretion In Barring Testimony Of A Surprise Witness

Appellants contend that the district court erred when it refused to allow them to present a previously unidentified witness on the final day of trial. The district court properly acted within its discretion in barring the proposed witness. See Sterkel v. Fruehauf Corp., 975 F.2d 528, 532 (8th Cir. 1992); Blue v. Rose, 786 F.2d 349, 351 (8th Cir. 1986).

Here, appellants proffered Mr. J.D. Smith to testify that he saw biracial children residing with tenants at Oak Manor (Tr. 4:1045-1046). The district court barred the witness and held that this proffered testimony would be unfair to the United States given the parties' obligation to identify witnesses prior to trial (Tr. 4:1046-1047). The court also noted that the witness was identified as a result of recollections by counsel's wife, who was also a witness (Tr. 4:1048). Here, as in Blue, 786

F.2d at 351, there was no surprise as to the nature of the United States' case, and no justification for Big D and Dr. Dooley's failure to seek and identify Mr. Smith prior to trial. Further, this evidence was cumulative, given other witnesses testifying to the presence of black or biracial tenants. See Sterkel, 975 F.2d at 532 & n.3 (exclusion of cumulative evidence "does not prejudice a party's case").

V

APPELLANTS' STATUTE OF LIMITATIONS CLAIMS ARE WITHOUT MERIT

Big D and Dr. Dooley contend that the claims asserted in this case are barred by the statute of limitations. The district court properly rejected that argument on the grounds that it had been waived. See Big D, 11 F. Supp.2d at 1051. Further, there is no merit to this claim since Big D and Dr. Dooley rely on the wrong provision of the FHA. Id. at 1051-1052.

Pursuant to Fed. R. Civ. P. 8(c), a defensive claim based on a statute of limitations is an "affirmative defense" which must be raised in a responsive pleading. Myers v. John Deere Ltd., 683 F.2d 270, 272-273 (8th Cir. 1982). Failure to raise a statute of limitations defense in a timely manner constitutes waiver. See Day v. Liberty Nat'l Life Ins. Co., 122 F.3d 1012, 1014-1015 (11th Cir. 1997), cert. denied, 118 S. Ct. 1797 (1998); Myers, 683 F.2d at 272-273. Here, appellants raised this affirmative defense for the first time in their post-trial motion for remittitur.

Substantively, appellants' statute of limitations argument

fails because they rely on 42 U.S.C. 3614(b), yet neither count of the United States' complaint is premised jurisdictionally upon this provision. See Big D, 11 F. Supp.2d at 1051-1052. By its terms, Section 3614(b) applies only to actions referred by HUD to the Department of Justice under 42 U.S.C. 3610(g)(2)(C). Actions under Section 3610(g)(2)(C) involve "the legality of any State or local zoning or other land use law or ordinance."

The Department of Justice filed Count I under 42 U.S.C. 3612(o), after HUD had made a determination of reasonable cause and issued an administrative charge, and after Big D and Dr. Dooley formally elected to have the charge heard in federal court. See 42 U.S.C. 3610(g), 3612(a). The relevant statute of limitations for claims under Section 3612(o) is set forth at 42 U.S.C. 3610(a)(1)(A)(i).[28]

Count II is premised upon 42 U.S.C. 3614(a), which authorizes the Attorney General to file suit whenever she has reasonable cause to believe that a pattern or practice of discrimination exists. See United States v. Incorporated Village of Island Park, 791 F. Supp. 354, 365 (E.D.N.Y. 1992); United States v. Marsten Apartments, Inc., 175 F.R.D. 257, 261 (E.D. Mich. 1997). The Attorney General's authority under this

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[28] That provision affords a complaining party one year to file a formal complaint with HUD. If such a complaint is timely filed, the enforcement mechanisms contained in 42 U.S.C. 3610-3612, which form the necessary prerequisite to Count I, are set in motion and the statute of limitations for filing suit in federal court under Section 3612(o) is tolled. Here, Ms. Williams filed her complaint on or about October 21, 1994, approximately 10 days after the events in issue (App. Exh. 5/App. Add. 39, Tr. 2:367, 414-415).

provision is independent and is not contingent upon a referral from HUD. Further, unlike Section 3614(b), Section 3614(a) does not contain a statute of limitations. See Village of Island Park, 791 F. Supp. at 364-367; Marsten Apartments, 175 F.R.D. at 261-262. Accordingly, defendants' statute of limitations defense to the United States' claims in Count II of the complaint is, similarly, without merit.

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY'S FEES OF $1899 FOR COSTS INCURRED IN PREPARING A MOTION TO COMPEL

By Memorandum Opinion and Order entered January 7, 1998, the district court granted the United States' motion to compel production of documents and responses to discovery by Big D and Dr. Dooley, and determined that fees should be awarded to the United States pursuant to Fed. R. Civ. P. 37 (R. 23 at 1-15/U.S. Apx. 1-15). Upon receipt of a memorandum and supporting declaration from the United States (R. 25/U.S. Apx. 23-29), the district court awarded fees and costs of $1,899 (R. 90/App. Add. 1-2). In reaching its conclusion, the district court assessed the hours claimed by the United States and the proposed hourly fee, considered the arguments by Big D and Dr. Dooley, and fairly concluded that $1899 was appropriate. Appellants challenge this award as excessive.

The standard of review is abuse of discretion. See Mansker v. TMG Life Ins. Co., 54 F.3d 1322, 1330 (8th Cir. 1995); Flowers v. Jefferson Hosp. Ass'n, 49 F.3d 391, 392 (8th Cir. 1995). In TMG, this court upheld the rate and total figure determined by the district court, noting that the district court "carefully reviewed the documentation supporting appellee's request and provided reasons for its determination of the amount to be awarded." 54 F.3d at 1330.[29] Here, the district court

[29] The fact that the district court in TMG reduced the rate and number of hours charged in its calculation, however, does not (continued...)

considered and rejected appellants' arguments. The district court determined that the proposed hourly rate, $125 per hour, was consistent with the Department of Justice attorney's experience and local market rates (App. Add. 1-2). See Altschuler v. Samsonite Corp., 109 F.R.D. 353, 357 (E.D.N.Y. 1986). In awarding $1899, the court accepted the United States' proposed total of hours, which did not include all attorney time involved in the underlying motion, and awarded costs associated with the use of Westlaw (App. Add. 2). This court should not substitute its judgment merely because it would choose a different hourly rate. See Milton v. Des Moines, 47 F.3d 944, 946 (8th Cir.) (while court of appeals may reach different result, no basis to reverse if district court considered factors relevant to assessment of fees where only nominal damages are awarded), cert. denied, 516 U.S. 824 (1995). Because the district court's assessment of attorney's fees is not an abuse of discretion, Big D and Dr. Dooley's claim should be denied.

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[29](...continued)
mean that such action is essential to uphold an award. See ibid.

CONCLUSION

This court should affirm the judgment, uphold the jury's verdict and awards of compensatory and punitive damages, and affirm the district court's order of $1,899 in fees and costs assessed against Big D and Dr. Dooley.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer Levin, hereby certify that on this 20th day of November, 1998, I served by first class mail, postage-prepaid, two copies of the Brief of the United States as Appellee and Appendix of the United States as Appellee to the following counsel of record:

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